No. 86-1746

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LINDA J. DARNELL (ROSE), ET AL.,
PETITIONERS,

V.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF OF PETITIONERS

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Respondent's Memorandum In Opposition demonstrates that the petition for certiorari

should be granted and that summary reversal should be given serious consideration.

1. FAA's Admitted Actions Prevented Petitioners From Having a Constitutionally-Required Hearing.

The Federal Aviation Administration (FAA) termination proposals instructed the petitioners to reply to the charges against them within seven days of receipt; as respondent admits, however, all petitioners lived and worked for the FAA in the Washington, D.C., area while "the return address on each [termination proposal] was the FAA's regional office in New York City." Respondent's Memorandum in Opposition (Res. Mem.) 1-2. In fact, both notices of proposed termination and the subsequent termination letters were on the stationery of the FAA Eastern Region headquarters in Jamaica, New York, to which the officials in petitioners'

Washington area facilities reported.[1]/ The FAA admits that, in response to the notices of proposed termination,

> [p]etitioners sent timely letters to the New York office requesting an extension of the reply deadline. Because of the delay caused when petitioners mailed their requests to New York, their supervisors issued termination letters before petitioners' requests reached them. The termination letters noted that petitioners had made no oral or written reply to the charges.

Res. Memo. 2.[2]/

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1 Photographic reproductions of the documents appear in the reported opinion and retyped versions appear in the appendix here. See Darnell v. Department of Transportation, FAA, 807 F.2d 943, 950, 953 (Fed. Cir. 1986); Pet. App. 33a and 44a.

2 Respondent inappropriately implies that petitioners -- none of whom ever before had been in a disciplinary proceeding under the Civil Service Reform Act of 1978 -- contributed to the FAA's confusion by following common protocol. Res. Mem. 2 n.2. Respondent appears to suggest that petitioners should not have

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The Due Process Clause "requires 'some kind of a hearing' prior to the discharge" of petitioners. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985) (citations omitted).

> The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story [before being terminated].

Id. at 546 (citations omitted). In petition-

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[2](...continued)
sent their requests to the only return address given in their termination proposals, but should have taken a chance in complying with a 7-day deadline by mailing them to the last known local addresses of the officials who signed and sent the notices under the New York address. Id.

ers' timely letters, petitioners expressly requested to see their employer's evidence and to have an opportunity to present their side of the story after seeing the evidence.[3]/ As shown above, petitioners were fired before their employer attempted to comply with their lawful requests and the law's parallel requirements.

2. Petitioners' Letters Were Not Replies to the Charges and, Even If They Were, They Were Not Considered Prior to Termination.

In its statement of facts, respondent notes that petitioners' initial responses to the termination proposals were for the purpose of "requesting an extension of the [7-day] reply deadline." Res. Mem. 2. However, in its argument, respondent (as did the FAA

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[3] Pet. App. 38a-40a (Rose letter, which is identical in all relevant respects to other petitioners' letters).

and the court below) incorrectly characterizes these letters as petitioners' "timely replies to the [substantive] charges" against them. Res. Mem. 4. The reasons why such a characterization is improper are set forth in the petition, Pet. 36-39, but are not addressed in respondent's opposition.[4]/

Further, the FAA's treatment of petitioners' timely procedural requests as substantive replies was an unconstitutional expedient; it amounted to no less than a deprivation of a meaningful opportunity to reply under circumstances in which such an oppor-

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[4] Respondent only provides, at Res. Mem. 4, the following non sequitur:

> Petitioners protest (Pet. 36-39) that they never intended their initial reply to be a full denial. But Loudermill does not give them a constitutional right to defer any substantive response to suit their own convenience.

tunity easily could have been provided.[5]/ This improper treatment and the agency's staunch defense of it fly in the face of the teaching of Loudermill and demonstrate the probability of a recurrence by the FAA and other organizations if this Court does not address the issue.

The Federal Circuit's treatment of petitioners' timely procedural requests for an extension of the 7-day reply time as a substantive denial of the charges is demonstrably clear error. Pet. 36-39. In fact, this

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[5] As Judge Cowen noted in his dissent, all petitioners' supervisors had to do was to rescind the terminations and allow petitioners to tell them their side of the story (an "oral pretermination hearing"). Rescissions were commonplace where the FAA supervisors made mistakes in notices sent to allegedly striking air traffic controllers. See, e.g., Kline v. Department of Transportation, FAA, 808 F.2d 43, 44 (Fed. Cir. 1986) (notice of proposed removal rescinded, reissued).

error is in direct conflict with the same court's treatment of the identical request in one of the lead air traffic controller cases, Adams v. Department of Transportation, FAA, 735 F.2d 488 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984). In Adams, petitioners actually alleged that their reply extension requests were substantive denials of the charges because they stated that there was no basis for the charge of committing a crime. Id. at 490. The court, holding that no petitioner denied the charges, found that the petitioners' "assertion that a sentence in one stock PATCO response (challenging any basis for a charge of committing a crime) was a denial of the charges is creative, but unavailing. The sentence was directed at the agency's use of a shortened notice period." Id. at 490 n.2; see also Pet. 36-43 (which

explains why this is so because the request was referencing the statute's criminal charge exception to a required 30-day notice minimum). The same court, however, in order to find a substantive reply upon which to hang its harmless error holding, became "creative" in its approach to the identical request in Darnell, holding just the opposite of what it held in Adams:

> Petitioner's (sic) standardized PATCO form "reply" to the agency's notice of proposed removal stated merely that "there is no basis to the charge that I have committed a crime for which a sentence of imprisonment may be imposed." Such a response cannot suffice to overcome a prima facie showing of strike participation. *** Thus, the perhaps premature issuance of removal letters in the context of this case, where the written replies by the petitioners were considered by the agency after the fact and do not on their face give any indication that receipt of the replies prior to issuance of the removal letters could have affected the agency's underlying factual conclusion, was harmless error.

807 F.2d at 946 (emphasis added). Thus, not only is there an intra-circuit conflict on how to apply the principles of Loudermill, Pet. 17-35, there is a conflict on the legal interpretation of requests for extensions of the statute's 7-day minimum notice period.

3. An Intra-Circuit Conflict Merits Review Where the Circuit Has Exclusive Jurisdiction and the Issue Is Important.

The federal Executive Branch is the largest employer of public employees in the United States and, apparently, the organization that regularly terminates the largest number of employees.[6]/ As such, it sets an

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[6] In fiscal year 1986 the Executive Branch discharged 13,762 federal employees, 5,057 in tenured positions, from just those agencies reporting to the Central Personnel Data File; that is, these numbers do not reflect employees discharged from the U.S. Postal Service, Central Intelligence

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example for countless state and local government officials.

The Federal Circuit has exclusive jurisdiction over the appeals of fired tenured federal employees who have failed to win their jobs back at the Merit Systems Protection Board. 28 U.S.C. 1295(a)(9) (Supp. 1987). Inconsistencies within the Circuit's decisions not only cause confusion among that court's panels, but throughout the substantial chain of adjudication that is controlled or influenced by the Circuit's interpretations: confusion among the Board members of the MSPB, who review appeals from decisions

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[6](...continued)
Agency, National Security Agency, Tennessee Valley Authority, White House Office, Board of Governors of the Federal Reserve Board, Federal Bureau of Investigation and Defense Intelligence Agency. See Office of Personnel Management, "Discharge and Related Data, FY 1986," at 1 and Table A.

by MSPB's administrative judges (formerly "presiding officials"); among the administrative judges who conduct evidentiary MSPB hearings nationwide; among the countless public officials who have to decide whether (and how) to fire their employees, and among the even larger number of public employees and those who represent them. Respondent's assertion that intra-circuit conflict does not merit review by this Court relies solely on Wisniewski v. United States, 353 U.S. 901 (1957). Such reliance is misplaced; that case easily is distinguished on jurisdictional grounds.[7]/

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[7] In Wisniewski, this Court dismissed a certificate submitted by the Eighth Circuit before that Circuit attempted a decision. This Court held only that a Circuit's doubt about the respect to be accorded one of its own previous panel decisions should not be the occasion for invoking so exceptional a jurisdic-

(continued...)

All substantive arguments submitted by respondent on the important questions of federal law raised by this case remain controverted and, petitioners submit, such controversy demonstrates that a writ of certiorari should be granted.

Respectfully submitted,

September, 1987

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[7](...continued)
tion of the United States Supreme Court as that on certification of questions. 353 U.S. at 902.